Petition

81-1607

No. 81-

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK HUSTED,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

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QUESTIONS PRESENTED

1. Whether the evidence of "predisposition" to commit the alleged crime fell short of the standard proclaimed in *Jackson* v. *Virginia*, 443 U.S. 307 (1981) and *Hampton* v. *United States*, 425 U.S. 484 (1976) and other decisions of this Court, so as to constitute a denial of due process under the Fourteenth Amendment and petitioner's defense of entrapment?

2. Whether the State's failure to produce its informant/entrapper in this and other similar cases, revealing a pattern, violated petitioner's right to confront his accusers under the Sixth Amendment as embodied in the Fourteenth Amendment?

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REFERENCE TO REPORTS

The Opinion of the Appellate Court, Second District, is reported in 97 Ill. App. 3d 160, 422 N.E. 2d 962 (1981) and is appended hereto at pages App. 1 thru App. 19. The order of the Supreme Court denying Petition for Leave to Appeal appears at page App. 20.

JURISDICTION

The judgment of the Appellate Court of Illinois, Second District, was entered on June 10, 1981. Petitioner's timely PETITION FOR LEAVE TO APPEAL was denied by the Supreme Court of Illinois on November 30, 1981, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1257(3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat. 929 as amended 28 USC §1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948 c. 646, 62 Stat. 929."

STATUTES AND CONSTITUTION INVOLVED

Ill. Rev. Stats. 1979, chap. 56½, par. 1401(a)(2):

"Except as authorized by this Act, it is unlawful for any person knowingly to manufacture or deliver, or possess with the intent to manufacture or deliver, a controlled substance. Any person who violates this Section with respect to:

(a) The following controlled substances and amounts . . . is guilty of a Class X felony. . . .

(2) 30 grams or more of any substance containing cocaine;"

Ill. Rev. Stats. 1979, chap. 38, par. 7-12:

"Entrapment. A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer

or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated."

USCA, Const. Amend. Fourteen, §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Nature of the case:

Petitioner Jack Husted, age 23, was indicted and convicted by a state court jury for allegedly delivering more than 30 grams of a controlled substance containing cocaine, a Class X felony. (Ill. Rev. Stats. 1979, chap. 56½, par. 1401(a)(2), supra.). Petitioner's affirmative defense of entrapment was rejected. He was sentenced to imprisonment for six (6) years, the minimum Class X term. Defendant had no prior criminal record.

Petitioner testified in his own behalf. He swore that he had never seen, used or sold cocaine in his entire life until he was enticed and cajoled into doing so by a special agent and informer of the State—i.e., that he was not pre-disposed to commit the offense.

Sequence of events:

In early October of 1978 petitioner made the acquaintance of Eugene "Big Mac" McWethy in a tavern, at which time petitioner gave "Big Mac" his home address. In mid-October McWethy visited defendant at his home and they had a conversation of several hours duration.*

Petitioner next saw McWethy on October 31 when "Big Mac" brought John Burns, Special Agent of the Illinois Department of Law Enforcement to meet him. Burns represented himself as a "ramp rat", a luggage handler for Northwest Airlines. Burns asked defendants if he had any cocaine and if he would sell him any. Petitioner denied that he had any cocaine and denied that he was in the business or wanted to get into the business.

Big Mac then engaged petitioner in a ten minute conversation outside the presence of Burns, (the contents of which was excluded as "hearsay"). Burns renewed his request for cocaine and petitioner repeated that he did not have any, and was not interested in obtaining any. The "ramp rat" told the petitioner he would be able to get a new car and change his lifestyle if he got into the business. Burns and McWethy said they would be in touch and McWethy telephoned petitioner a couple of hours later on the afternoon of October 31. (The content of that telephone conversation likewise was excluded.)

Shortly after the telephone call Burns and McWethy again appeared at defendant's house and Burns renewed his request for cocaine. McWethy motioned petitioner to leave the house with him and they drove to a Mac-

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* The trial court refused to permit petitioner to testify about any conversations he had with "Big Mac" who was the State's informer/entrapper, whose whereabouts were known to the State but not to defendant. (See discussion post).

Donald's Hamburger in a nearby town in petitioner's car. Petitioner exited the car, McWethy departed with the car stating he would go get the cocaine and a scale. McWethy allegedly told petitioner that he would make "$75.00 that day real easy". McWethy reurned to MacDonald's and gave petitioner a bag saying it was a quarter ounce of cocaine and he wanted $475.00 for it. McWethy had a suitcase with him which contained a scale and various paraphernalia. McWethy instructed petitioner how to use the scale and how to deal with Burns.

Big Mac, and petitioner returned to the latter's house. Petitioner and Burns went upstairs where petitioner weighed the bag as instructed. Burns tested the substance by wetting his index finger, dipping it into the powder and then rubbing it between his upper lip and gum. Petitioner followed suit. Burns declared it was "good coke" and paid petitioner $550.00 for the bag which had close to 7 grams. Burns stated he would come back for more at some later time.

Downstairs, and out of Burns' presence petitioner handed the $550.00 to McWethy who returned $75.00. Before Burns and McWethy departed Burns chided petitioner for having a junk car and a "shack" house, and asserted that petitioner would be in the money and his life would change if he kept on selling drugs.

Petitioner received a phone call from Burns about a week after October 31, requesting petitioner to sell him another quarter ounce. Burns continued to call every day for about a week. McWethy then telephoned petitioner on November 13 and they had a conversation in which McWethy stated he could deliver a quarter ounce the next day.

When Burns called on November 14, according to his testimony, petitioner told him he thought he could get the cocaine for him. McWethy had already delivered the ¼ ounce, which was temporarily stored in an old refrigerator in a horse barn at petitioner's parents' home.

Petitioner stated that he allowed McWethy to bring him the cocaine because he succumbed to Big Mac's suggestions of the amount of money he could make by selling drugs. McWethy wanted $475.00 for the quarter ounce and cautioned petitioner against "messing up" on the money. McWethy allegedly suggested that petitioner take a little of the cocaine out of the bag and replace it with baking soda, so he would be able to have a little for himself and still make $75.00. Petitioner testified he did do this.

In the evening of November 15, Burns came to petitioner's house, where he and petitioner performed the "testing ritual" once again. Burns complained about the quality and refused to pay $550.00. Burns told defendant that a two ounce transaction would be more profitable and that Burns had a ready market in Madison, Wisconsin, "crying for it". Burns spent 15 to 20 minutes trying to convince petitioner to make a two ounce sale. Petitioner then agreed to accept $530 and threw in the separate small package of cocaine that he had previously removed from the quarter ounce bag.

Another special agent testified that two male subjects and a female arrived and entered petitioner's house sometime after 9:30 p.m. and that Burns emerged with one small and one large bag about 10 minutes after the female had come back out to the car, appeared to be looking for something there, and then re-entered the house.

Burns testified that the small package was given to him by petitioner as a sample of the kind of "killer coke" that petitioner could get for him.

Burns testified that while he and Husted were waiting for Rocky, an alleged supplier, to arrive, Husted received several telephone calls, that after one such call petitioner took out of the closet a small sized plastic garbage bag containing a leafy green substance that smelled to Burns like marijuana. According to Burns petitioner then divided the substance between two smaller bags while explaining to Burns that he wished to get out of the marijuana trade and get into cocaine exclusively, but that he had only four regular cocaine customers and couldn't make enough money with such a limited clientele. Petitioner then left the room with the two bags to answer a knock at the downstairs door and returned upstairs without the bags.

An agent testifying for the State testified that about six or eight cars came to and left the house during the time Agent Burns was inside with petitioner.

Defendant denied he had any cocaine customers, or ever sold or gave any marijuana except that he occasionally smoked marijuana and passed on a marijuana cigarette to someone else. Petitioner denied that he had ever used cocaine before he met Burns on October 31. He had never heard the expression "coke" until McWethy and Burns used the term.

Petitioner next heard from Burns about a week after the November 15 transaction when Burns wanted to "cop" (buy) a 2 oz. amount of cocaine. Petitioner told Burns he "didn't have any", "didn't want to get in on this level", "didn't know if [he] could get any even if [he] wanted to", "wasn't pleased with the business" and "it made [him] nervous."

The special agent told petitioner he could make a lot of money, could get a nicer car and should not worry because it would be safe. After a week, Burns began to call every

day for three consecutive days. The calls of the first two days were deeded entreaties to sell 2 oz. of cocaine. The third call late on November 24 was about a non-related matter.

After the November 15 transaction, petitioner had seen McWethy when "Big Mac" came to collect his $475.00. McWethy next called petitioner on the morning of November 24 about an ounce of cocaine he could deliver to petitioner the next day.

Shortly after the phone call of November 24, McWethy arrived at petitioner's house and gave him a bag containing an ounce of cocaine. It was tested and McWethy said he wanted $1800 for it and cautioned petitioner against "messing up" the money. Later McWethy threatened petitioner. Petitioner again stored the cocaine in his parents' horse barn refrigerator, where it remained until December 3.

McWethy called petitioner every day between November 24 and December 2. Petitioner stated he asked McWethy to take the ounce of cocaine back because he feared for his life, was nervous and frightened. Petitioner testified he had nowhere to sell the cocaine except to Burns, that part of his motivation for going through with the 2 oz. sale was his anticipated $1600 profit and he was always contacted by Burns, never the other way around.

In a November 29 call from Burns, petitioner told him that he thought he could get the 2 oz. for him. The sale was postponed until December 3. In the interim petitioner phoned his married sister and told her about being threatened of being maimed and have his limbs broken. That he "wouldn't see 1979" although he could not tell her the exact cause of his fright.

On December 3rd defendant retrieved the 1 oz. cocaine from the barn and upon earlier telephone instructions from Big Mac, he mixed with enough baking soda to make two 1 oz. bags.

When Burns arrived on December 3 at petitioner's house he tested the substance and the two bags weighed at about 28 grams each. Burns then gave petitioner $3400.00. Shortly after petitioner was arrested.

The trial:

The trial court refused to permit petitioner to testify about the various conversations he had with the State's informer McWethy. Those conversations with the informer related to repeated attempts by Big Mac to inveigle and persuade petitioner to get into the drug-selling business. Big Mac would be the supplier and petitioner could then afford a new car, better living quarters and improve his "lifestyle." The conversations which the trial court excluded as hearsay could be summarized as follows:

> Early October 1978:—Petitioner meets "Big Mac" at the tavern and tells McWethy where he resided;
>
> Mid-October 1978:—Big Mac, after repeated phone calls, uninvited comes to petitioner's house and engages him in conversations of several hours' duration;
>
> October 31, 1978:—(Several days after Big Mac is himself arrested for possession of cannabis and theft and released on his own *recognizance bond* [sic!]:—Big Mac comes to petitioner's house with Burns posing as a cocaine customer. The gist of the conversations which the trial court excluded is (1) that Burns had "more money than sense", (2) that Burns had once cheated Big Mac who wanted revenge by selling Burns inferior cocaine diluted with baking powder;

(3) that Burns was a "big lying cheating sow-belly slob" and that such sale was the only way McWethy could recover money from Burns, who had cheated him.

November 13, 1978:—"Big Mac" persuades defendant to make the second sale of cocaine to the order of a quarter ounce after defendant repeatedly refused entreaties by Burns to sell him cocaine.

November 24-29; December 1-2:—McWethy telephoned defendant every day and makes threats.

The foregoing alleged conversations between defendant and the State's informer were excluded by the trial court as "hearsay"—even though the alleged conversations took place with an agent of the State and were crucial to defendant's affirmative defense of entrapment.

The appeal:

The Appellate Court of Illinois, Second District, agreed with defendant's contention that the exclusion of the alleged conversations was error because where alleged hearsay conversation is integral to a defendant's theory of defense, such exclusion is a denial of a fair trial.

Moreover, the Appellate Court recognized that the trial court's:

> ". . . exclusion of McWethy's out-of-court statements on and after October 31 *was error because such statements were not hearsay.* They were not offered to prove that the narcotics business is a lucrative one, but to show the effect of McWethy's statements had on the defendant's action." (A. 12) (Emphasis added).

While acknowledging the foregoing exclusion as error and recognizing the rule of law that defendant is denied a fair trial if alleged hearsay integral to the defendant's theory of defense is excluded, nevertheless the Appellate Court treated the exclusion as "harmless error" and ruled:

> "Despite the Court's erroneous exclusion of this evidence, however, we agree with the State that the error does not mandate reversal under the facts of this case." (A. 12).

HOW THE FEDERAL AND CONSTITUTIONAL QUESTIONS WERE PRESENTED

Petitioner filed a timely PETITION FOR LEAVE TO APPEAL with the Supreme Court of Illinois on August 26, 1981. In that Petition, petitioner contended, inter alia:

> "The Appellate Court in the case at bar committed reversible error in failing to respect the United States Supreme Court doctrine and decisions . . . concerning the elements of 'entrapment' and 'predisposition' ".

The Supreme Court denied the PETITION FOR LEAVE TO APPEAL on November 30, 1981. Thus, the Appellate Court of Illinois, Second District, is the "highest court in [the] State in which decision could be had." 28 U.S.C. §1257(3).

ARGUMENT

I.

THE STATE'S EVIDENCE OF "PREDISPOSITION" TO COMMIT THE ALLEGED CRIME FELL SHORT OF THE STANDARD PROCLAIMED BY THIS COURT, DEPRIVING PETITIONER OF A FAIR TRIAL AND DENYING HIM DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Illinois Criminal Code recognizes entrapment as a valid defense where the conduct of the offender "is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person." (Ill. Rev. Stats. chap. 38, par. 7-12).

The statute goes on to provide that the offense is not available where "a public officer or employee, or agent of either merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose *which such person has originated.*" (*Ibid*) (Emphasis added).

The Illinois statute thus reflects entrapment doctrine enunciated by this Court. *Sorrells* v. *United States*, 287 U.S. 435 (1932); *Sherman* v. *United States*, 356 U.S. 369 (1958); *United States* v. *Russell*, 411 U.S. 423 (1979); *Hampton* v. *United States*, 425 U.S. 484 (1976).

Under the basic test set forth by this Court, the issue is whether the conduct of the informer and collaborating agent implanted into the mind of an innocent person (as here, with no prior criminal record) the disposition to commit an offense and induce its commission. "A line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," *Sherman*, p. 372.

In the case at bar, even under the recitation of the facts in the Appellate Court's opinion (A 1-11), the State's informer and special agent did more than afford petitioner "the opportunity or facility for committing an offense", the criminal purpose of which *did not originate* in the mind of petitioner. Rather, the evidence clearly shows that petitioner's conduct was incited and induced by repeated cajolements or threats of violence on the part of the State's informant, and that the criminal purpose did originate with petitioner. The prime element of predisposition, mandated by the Illinois Statute is missing here.

In the recent case of *Jackson* v. *Virginia*, 443 U.S. 307 (1981), the court said at p. 319:

> ". . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Court's emphasis).

In the case at hand the burden of overcoming the defense of entrapment shifted to the State upon the plea of petitioner that he was entrapped. That burden was never met because from the State's evidence "of predisposition", when viewed "in the light most favorable to the prosecution", no rational trier of fact could have found the essential elements of predisposition "beyond a reasonable doubt".

In the case at bar the petitioner:

> —did not initiate the idea of going into the drug selling business; that idea, from the inception, was the State's informant's, McWethy, who repeatedly pressed his company upon petitioner and communicated various blandishments and finally threats against petitioner's life.

> —did not telephone or solicit the source of supply; rather the informant/supplier telephoned and repeatedly contacted as well as supplied petitioner.
>
> —was not familiar with cocaine* and only familiarity with any narcotics is that he occasionally smoked marijuana whose status as a narcotic is questionable.

The state failed to show that petitioner had ever previously sold drugs. This factor, though not determinative (since there is always a "first time"), is a factor negating predisposition. (*People* v. *Cooper*, 17 Ill. App. 3d 954 (1974)). Petitioner did not set the price of the cocaine sold to Burns, supplied by McWethy, but he merely accepted the price Burns had offered. Although petitioner initially "cut" the cocaine with baking soda, the fact is that he ultimately replaced the small portion of cocaine extracted. Hence, if "willingness to profit" is the predisposing factor, there would have been no reason for petitioner to restore the pure coke.

McWethy enlisted petitioner in the enterprise by pretending a desire for revenge on Burns by diluting the cocaine. Petitioner's act in restoring the pure cocaine was not what McWethy wanted him to do in "getting even" with Burns.

The Appellate Court states:

> "We also consider as evidence the predisposition is [petitioner's] one-two-three times a month use of marijuana. . . ." (A. 14).

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* The mixing of cocaine with baking soda to expand the quantity, as suggested by McWethy, is highly revealing of petitioner's naivete and impeaches the credibility of the prosecution. Baking soda is a substance with an easily recognizable taste and would be familiar to anyone and would hardly fool a purchaser.

As a matter of law the occasional smoking of marijuana could hardly be indicative of a predisposition to sell cocaine. The Appellate Court also notes that petitioner "expressed no reluctance whatsoever in participating in the cocaine testing ritual." (A. 15). The countervailing fact is that McWethy was the teacher instructing defendant in the use of the cocaine paraphernalia.

In the case at bar the State contended that one "Rocky" Sloan was a supplier of petitioner. The record is devoid of any satisfactory evidence of this critical fact. No State witness saw or testified to "Rocky" as supplier, and "Rocky", if such person existed, was never arrested or produced. The disposing factor in the case at bar is that Big Mac was the supplier, that Burns and McWethy—the two State agents—arranged every sale.

The Appellate Court completely fails to note, or attribute any significance to the fact that petitioner was an honor student and has no prior criminal record, let alone involvement in drug sales.

II.

THE STATE'S FAILURE TO PRODUCE ITS INFORMANT/ENTRAPPER IN THIS AND OTHER SIMILAR CASES, REVEALING A PATTERN, VIOLATED PETITIONER'S RIGHT TO CONFRONT HIS ACCUSERS UNDER THE SIXTH AMENDMENT AS EMBODIED IN THE FOURTEENTH AMENDMENT.

The failure of the State to produce Big Mac McWethy, its informant, as a witness, deprived petitioner of a fair trial, because it enabled the State to evade its burden of overcoming the entrapment defense.

Under the Illinois Entrapment Statute, the defendant has the burden of producing some evidence that he was

entrapped. Upon such a showing the burden shifts to the State, which must prove *a lack of entrapment* beyond a reasonable doubt. *People* v. *Tipton*, 78 Ill. 2d 477 ("Once the entrapment defense is raised, it becomes incumbent upon the State to prove beyond a reasonable doubt that entrapment did not occur." p. 487).

The State is responsible for the actions of its informant, especially when the defense of entrapment is raised. The State could easily rebut defense testimony concerning the manner in which drugs were found or the inference of their probable source, by calling the informer to testify about any of the salient issues raised by the entrapment defense.

In the case at bar, the State's excuse that "Big Mac" was unavailable as a witness, although requested to be produced by petitioner, is grossly incredible. It is a curious fact that "Big Mac"—himself charged with the offense of possessing a controlled substance and theft was free on a *recognizance bond!* At the very time he was alleged to have disappeared and a "fugitive", "unavailable" as a witness against petitioner—he was in fact collaborating with John Burns, a special agent of the Illinois Department of Law Enforcement who had to know his whereabouts. The State "cannot make such use of an informer and then claim disassociation through ignorance". (*Sherman* v. *United States*, 356 U.S. at 375).

This Court is invited to note the coincidence which has become a pattern of numerous Illinois entrapment cases. In *People* v. *Dollen*, 53 Ill. 2d 280; *People* v. *Tipton*, 78 Ill. 2d 477, *supra*; *People* v. *Pates*, 80 Ill. App. 3d 1062 (1980); *People* v. *Cross*, 63 Ill. App. 3d 628, rev'd 77 Ill. 2d 396; and *People* v. *Dempsey*, 82 Ill. App. 3d 699 (1980), as in the case at bar, the State informants who were instrumental in entrapping the defendant in those cases, and had personal motives to do so, were not "available" to testify

to resolve "the conflict engendered between the evidence of entrapment and the allegations of predisposition". (See *Tipton, supra,* at p. 492).

In the circumstances of the instant case, the failure to produce Big Mac, and to confront him before a jury with the episodes and conversations which led to the entrapment was a default by the State to carry its burden of overcoming the entrapment defense and deny petitioner his Sixth Amendment right to confront the principal accusing State witness.

III.

THE ERROR OF EXCLUDING PETITIONER'S PROFFERED TESTIMONY OF CONVERSATIONS WITH THE STATE'S INFORMANT DEPRIVED PETITIONER OF A FAIR TRIAL BECAUSE IT EXCLUDED THE EVIDENCE OF HIS THEORY OF ENTRAPMENT.

The Appellate Court's opinion acknowledges:

> "The exclusion of an alleged hearsay conversation which is integral to defendant's theory of defense has been held to deny the defendant a fair trial. [citation]. As such, the error asserted would be cognizable as plain error.
>
> * * *
>
> "Further, an offer of proof is not required when the evidence sought to be admitted is obviously material and relevant. [citation]. No doubt the trial court was aware of what defendant was trying to establish by the excluded conversations, and its exclusion of McWethy's out-of-court statements on and after October 31 *was error because such statements were not hearsay.* They were not offered to prove that the narcotics business is a lucrative one, but to show the effect that McWethy's statements had on the defendant's actions." (A. 11-12) (Emphasis added).

Yet, acknowledging such error, and indeed, citing cases which hold such error to be reversibly prejudicial, the Illinois Appellate Court goes on to affirm the conviction of petitioner in the following words:

> "Despite the Court's eroneous exclusion of this evidence, however, we agree with the State that the error does not mandate reversal under the facts of this case." (A. 12)

The reasons then discussed by the Appellate Court for treating the admitted error as merely "harmless" are without merit. There was, in fact, no satisfactory substitute for petitioner's right to recount the conversations with Big Mac and those conversations would not have been hearsay nor offered as such.

The tools that the State's informant used to entrap the petitioner were words:—persuasions, promises, entitements and finally outright naked threats. The exclusion of that evidence necessarily made it easier for the State to shirk its burden of proving beyond a reasonable doubt that petitioner was not entrapped.

The record shows that petitioner was the sole defense witness. Deprived of the right to testify as to the conversations with the State's informant, the jury had less of an opportunity to give credence to petitioner's theory of the case. The heart of the defense, the most crucial part of the entrapping cajolements and threats were lost to the petitioner and to his great prejudice.

It is further submitted that the Appellate Court, in rationalizing the preclusion as "harmless" misapprehended the critical fact that the conversations with Big Mac were more than merely cumulative. What was involved in the offered testimony were conversations with Big Mac *outside of the presence of Special Agent Burns.*

Although the jury heard about Burns' enticements of more money, a nicer car and improved living quarters, none of those episodes by themselves were successful in converting petitioner into the delivery scheme, notwithstanding three visits to petitioner's home.

But the jury did not hear the contents of a telephone call from McWethy, the private conversation with McWethy in petitioner's bedroom outside of the presence of Burns. Likewise the conversation in the driveway and in defendant's car when he departed with McWethy were all outside of the presence of the State's Special Agent—and these were the conversations that actually persuaded petitioner into participating in the delivery of the contraband that McWethy persistently suggested he could supply.

It was in these excluded conversations—all outside of the presence of Burns—that McWethy informed petitioner that Burns had more money than sense, that Burns had cheated him, that he, Big Mac, wanted to get even by selling Burns some inferior cocaine, that Burns was a "big, fat, lying sowbelly slob" and that such a sale, with petitioner's participation, would enable McWethy to recoup the money out of which Burns had cheated him—a fabricated story.

The essence of the enticement of petitioner by Big Mac was the extreme bitterness expressed by him toward Burns and the portrayal of himself as the victim of Burns' lying and cheating. He thereby attempted to play upon petitioner's sense of justice and to enlist the help of petitioner in getting even, in getting his money back—help right the pretended wrongs. The conversations would have thereby shown the jury that McWethy fervently sought petitioner's assistance and that he could not have gotten even with Burns without petitioner's help.

It was the persistent campaign of McWethy and his threats which finally overcame petitioner's steadfast reluctance and refusal to participate in the sale and delivery of cocaine.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Appendix

APPENDIX

Opinion of the Court

(Filed June 10, 1981)

No. 79 608

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

JACK HUSTED,
Defendant-Appellant.

Appeal from the Circuit Court for the 16th Judicial Circuit, Kane County, Illinois.

MR. JUSTICE UNVERZAGT delivered the opinion of the court:

The defendant was indicted on December 26, 1978 in Kane County for the December 3, 1978 unlawful delivery of more than 30 grams of a substance containing cocaine, a controlled substance. (Ill. Rev. Stat. 1979, ch. 56½, par. 1401(a)(2).) Defendant pleaded not guilty and raised the affirmative defense of entrapment. (Ill. Rev. Stat. 1979, ch. 38, par. 7-12.) A jury found him guilty of the offense charged, his post-trial motion was denied, and he was sentenced to the Department of Corrections for six years, the minimum term permitted for this Class X felony.

The defendant asserts that he was denied a fair trial due to the trial court's refusal to allow him to testify about conversations he had with the State's informer whereby he was entrapped into committing the offense. He further asserts reversible error occurred as the result of the prosecutor's closing argument, and in permitting the testimony of a purported character rebuttal witness. We affirm.

The record disclosed the following sequence of events. In early October of 1978, the defendant made the acquaintance of Eugene "Big Mac" McWethy at a bar at which time defendant gave him his home address. In mid-October, McWethy visited the defendant at his house and they had a conversation of several hours' duration. The court sustained the State's hearsay objection to the contents of the conversation and no offer of proof was made. The defendant next saw McWethy on October 31, when McWethy brought John Burns, a special agent of the Illinois Department of Law Enforcement, to meet him. The circuit clerk testified McWethy had been charged by information several days prior to this time on October 25 with unlawful possession of cannabis and theft, and that he had been released on October 30 on a recognizance bond. The clerk also testified McWethy's case was continued four times, once at defendant's request, once by agreement, and twice on motion of the State, and that a warrant for his arrest was issued on April 4, 1979. It was stipulated by the parties that the clerk's file on McWethy was true and correct.

Burns represented himself to be a "ramp rat" (a luggage handler) for Northwest Airlines. He asked the defendant if he had any cocaine and if he would sell him any. Defendant denied he had any cocaine, was in the business, or wanted to get into the business. McWethy then engaged the defendant in a 10-minute conversation

outside the presence of Burns, the content of which was objected to as hearsay and sustained. No offer of proof was made. Burns renewed his request for cocaine and the defendant repeated he did not have any and was not interested in getting any. Defendant testified he had never seen, tried or sold cocaine or any other drug in his entire life until he was entrapped into dealing with John Burns. Burns told defendant he would be able to get a new car and change his lifestyle if he got into the business. Burns and McWethy said they would be in touch, and McWethy telephoned the defendant a couple of hours later during the afternoon of the 31st. The State's hearsay objection to that conversation was sustained. No offer of proof was made. Burns and McWethy arrived at defendant's house shortly after the call, and Burns renewed his request for cocaine. McWethy motioned to the defendant to leave the house with him and the defendant drove with McWethy to McDonald's in Dundee in the defendant's car. The defendant exited the car, and McWethy left with the car, saying he would go get the cocaine and scale. Defendant testified that in one of the earlier conversations that was not admitted by the trial court, McWethy had told him that he would make "$75.00 that day real easy." McWethy returned to McDonald's, gave defendant a bag saying it was a quarter ounce of cocaine and that he wanted $475 for it. McWethy also had a brown suitcase with him which contained a scale and various paraphernalia. The defendant testified McWethy instructed him how to use the scale and how to deal with Burns. They returned to defendant's house; two other persons were present there with Burns, one of whom was nicknamed "Rocky." The defendant testified Rocky had recently sold him a Doberman Pinscher, that he still owed him $100 for it, and that he went upstairs with Rocky for about five minutes because he was embarrassed to have a creditor there in front of the others.

The defendant's position at trial was that McWethy supplied him with the drugs that he was to sell. McWethy did not appear at trial in order to rebut the defendant's testimony. The State maintained that it did not know McWethy's whereabouts, and that no one except the defendant ever saw or heard from McWethy after the October 31 transaction. The State further maintained that Rocky conceivably was the defendant's source, since Rocky co-incidentally was present at the October 31 sale and at a later sale on November 15.

After Rocky left, the defendant and Burns went upstairs, where the defendant weighed the bag as instructed. Burns tested the substance by wetting his index finger and dipping it into the powder and then rubbing it between his upper lip and gum, and the defendant followed suit. Burns declared it was "good coke," and paid the defendant $550 for the bag which had weighed close to seven grams. Burns said he would be in touch because he would want to "cop" (procure) some more. Downstairs and out of Burns' presence, defendant handed the $550 to McWethy who gave him back $75. Before he and McWethy left, Burns chided the defendant for having a junk car and a "shack" house, noting that defendant would be in the money and his life would change if he kept on selling drugs. The defendant explained he did not have much money because he was just beginning to sell Amway products, and did not have a large clientele yet. He supplemented his income by working part-time as a waiter, and frequently borrowed money from his mother. The defendant denied ever stating to Burns that he could "do" a couple of ounces the next week or that "with a little notice" he could get Burns a quarter of a pound of cocaine.

The defendant received a phone call from Burns a few days or a week after October 31, asking defendant to sell him another quarter ounce. He continued to call every

day for about a week. McWethy then telephoned the defendant on November 13 and they had a conversation, the subject of which was the quarter-ounce McWethy could deliver to him the next day. The State's hearsay objection to this conversation was sustained and no offer of proof was made. When Burns called on November 14, the defendant told him he thought he could get the cocaine for him. He explained he expressed no reluctance about securing the cocaine because McWethy had already delivered the quarter-ounce to him and he had temporarily stored it in an old refrigerator in a horse barn at his parents' home. The defendant explained that he put the cocaine there so that no one would accidentally find it at his house. He said he had allowed McWethy to bring him the cocaine because he succumbed to McWethy's suggestions of the amount of money he could make by selling drugs. McWethy stated he wanted $475 for the quarter-ounce, and cautioned the defendant against "messing up" on the money. He suggested that he take a little of the cocaine out of the bag and replace it with baking soda so he would be able to have a little for himself and still make $75. The defendant testified that he did do this.

At approximately 9 p.m. on November 15, Burns came to the defendant's house and was ushered upstairs where he and the defendant performed the testing ritual once again. Burns complained about the quality and refused to pay $550. They haggled about the price and at one point Burns told the defendant that a two-ounce transaction would be more profitable, and that Burns had a ready market in Madison, Wisconsin, "crying for it." The defendant testified Burns spent 15 to 20 minutes trying to convince him to make a two-ounce sale. Defendant then agreed to accept $530 and threw in the separate small package of cocaine that he had previously removed from the quarter-ounce bag.

Burns testified contrarily that the defendant had offered him a discount on the transaction since the defendant did not have the cocaine when he first arrived at 9 o'clock because Rocky, the defendant's source, was running late. Special Agent Petersik, who was observing the exterior of the house, testified that two male subjects and a female arrived and entered the house sometime after 9:30 p.m., and that Burns emerged with one small and one larger bag about 10 minutes after the female had come back out to the car, appeared to be looking for something there, and then re-entered the house. Burns testified the small package was given to him by the defendant as a sample of the kind of "killer coke" the defendant could get for him. Burns also testified that while he and the defendant were waiting for Rocky to arrive, the defendant received several telephone calls. After one such call, the defendant took out of the closet a small-size plastic garbage bag containing a leafy green substance that smelled to Burns like marijuana. Burns said the defendant divided the substance between two smaller bags while explaining to Burns that he wished to get out of the marijuana trade and get into cocaine exclusively, but that he had only four regular cocaine customers and couldn't make enough money with such a limited clientele. The defendant left the room with the two bags to answer a knock at the door downstairs, and returned upstairs without the bags. Agent Petersik testified that about six or eight cars came to and left the house during the time Agent Burns was inside.

Burns' testimony reflected that when Rocky arrived with a female and another man shortly after 9:30, Burns was asked to go downstairs while Rocky and the two others went upstairs. Burns testified the female came back downstairs, went outside, and then came back into the house. She talked with him for a few moments about the dog, and someone hollered to her from upstairs whereupon she

handed something from her pocket to someone on the stairs. The defendant testified that he still owed Rocky $100 for the dog at that time; the defendant opined that Rocky's girl friend was embarrassed by the debt discussion, and she went downstairs to get a pack of cigarettes and go to the bathroom.

The defendant denied he had any cocaine customers or ever sold or gave away any marijuana except to the extent he had infrequently smoked and then passed on a marijuana cigarette to someone else. The pre-plea report prepared by an adult probation officer after an interview with the defendant, who was described as having been "very open and honest", reflected the defendant used marijuana with his friends one to three times per month and used cocaine one to two times a week up until January of 1979. At trial, the defendant testified he never used cocaine before he met Burns on October 31, and that he never heard the expression "coke" until McWethy and Burns used the term. During rebuttal, a witness called by the State, Detective Donahoe of the Carpentersville Police Department, testified to a conversation he had with the defendant during June or July of 1977. During the conversation, the defendant expressed a desire to inform on persons in Elgin who he believed were dealing in drugs. He said he knew a lot about drugs because he had spent five or six thousand dollars of his parents' money on drugs when he was away at school, and that he had used and sold all kinds of drugs. On surrebuttal, the defendant denied he knew anything about drugs, and that during his conversation with Detective Donahoe he admitted he used marijuana occasionally but knew nothing about any hard drugs.

The defendant testified he next heard from Burns about a week after the November 15 transaction and that Burns

wanted to "cop" (buy) a two-ounce amount of cocaine. Defendant said he told him he "didn't have any", "didn't want to get in on this level", "didn't know if [he] wanted to", "wasn't pleased with the business", and "it made [him] nervous." Burns told him he could make a lot of money, could get a nicer car, and should not worry because it would be safe. Another week passed and Burns began to call every day for about three consecutive days. The first two days' calls were repeats of his entreaty to sell him two ounces of cocaine. The third call, late on November 24, was to tell the defendant he had to go out west to attend his girl friend's funeral. The defendant had seen McWethy the day after the November 15 transaction when McWethy came to collect his $475. McWethy next called the defendant the morning of November 24 about an ounce of cocaine he could deliver to the defendant the next day.

The defendant then offered to prove through the testimony of Eugene McWethy, that on October 31, 1978 and on numerous other times thereafter, McWethy repeatedly entreated Jack Husted to get into the business; that he could furnish him the narcotics; that they would both make a lot of money; that the defendant would not have to live in an old house, drive an old rattle-trap car, or be without spending money. The defendant argued that the conversations were offered to show they occurred and not to prove the truth of the matter asserted and, thus, were not hearsay. The court ruled the conversations were not admissible.

McWethy arrived at the defendant's house shortly after the phone call on November 24 and gave him a bag containing an ounce of cocaine. They tested it, and McWethy said he wanted $1800 for it and cautioned the defendant against "messing up" the money. The defendant testi-

fied McWethy made no threats that day, but did at later times. Defendant again stored the cocaine in his parents' horse barn refrigerator where it remained until December 3.

Burns next called on about November 29 and McWethy called every day between the 24th and December 2. A hearsay objection which was sustained cut off defendant's attempt to relate a threat made by McWethy. No offer of proof was made. Defendant testified his reaction to McWethy's phone calls was that he feared for his life, became nervous and frightened, paced around the house and perspired quite a bit. Defendant asked McWethy to take the ounce of cocaine back, and stated he thought he would get hurt if he did not get the money McWethy demanded for the ounce. The defendant testified he had nowhere to sell the cocaine except to Burns, that part of his motivation for going through with the two-ounce sale was his anticipated $1600 profit, and that he was always contacted by Burns, never the other way around.

When Burns called on November 29, the defendant told him he thought he could get the two ounces for him. The defendant could not recall exactly why the sale was postponed until December 3, but he thought it was because he had to work on November 30, December 1 and 2. Burns called the defendant on December 2 and reiterated the defendant's potential for profit by selling drugs, and urged him to relax because everything would go smoothly. The defendant testified he called his married sister, Isabel "Bunny" Hughes, on December 2 to ask her to keep a good thought for him and to pray for him because he was frightened for his life and certain people—whom he did not name—were making him do something he did not want to do. He told her he had been threatened to be maimed and have his limbs broken, and that he "wouldn't see

1979." He did not tell her the exact cause of his fright. Mrs. Hughes was called as a character witness and corroborated the fact of the phone call.

On December 3, the defendant retrieved the one-ounce of cocaine from his parents' horse barn and, upon the earlier telephone instructions of McWethy, he mixed it with enough baking soda to make two one-ounce bags. When Burns arrived on December 3, the defendant admitted him to the house; defendant's roommate, Jeff Becker, was asleep in the downstairs bedroom, and a friend of Becker's, Jay Kennedy, was asleep in the downstairs living room. Burns tested the substance, and the defendant weighed out the bags at about 28 grams each. Burns then gave the defendant $3400 which was the price the defendant stated Burns had offered and he had accepted during an earlier phone conversation. Becker walked into the room at this point, and since Burns had asked the defendant to go outside to meet someone, the defendant gave the money to Becker, asked him to hide it for him for awhile, and told him he knew how much was there, so he should "just put it away." Burns and the defendant walked outside, the defendant was introduced to Special Agent Petersik and was arrested.

Other agents appeared on the scene, and defendant stated their behavior was as though they had just won a football game; they were running, screaming, hollering, laughing and smiling, and holding guns to his body. The agents re-entered the house with the defendant in tow and recovered the $3400 from Becker at gunpoint from beneath some loose carpet squares in his bedroom. The defendant testified one of the agents put a gun to Kennedy's head and cautioned him that if he said one word about what had happened that there were other people around who would set him up just like they had the defendant. Pictures of the defendant's house taken one or

two days after his arrest were admitted into evidence. They depicted disarrayed furniture and clothes strewn about, chunks of plaster missing, and smashed and unhinged entry doors, and a broken entry door frame. A rebuttal witness called by the State, Elgin Police Department Detective Copher, testified he had observed no agents smashing or tipping over furniture or knocking plaster off the walls. When he and the other agents first entered the house immediately after the arrest, he observed it to be somewhat in a disarray, clothes strewn about, etc. He did note that the west entry door frame was knocked loose and the door was ajar when he entered. He stated that to his knowledge, only one uniformed officer had a shotgun with him at the time of the arrest.

The State first argues the defendant has waived consideration of the hearsay issue because he failed either to make an offer of proof or to make a proper offer of proof after the court sustained the objections to the conversations in question. The State points out the one offer of proof which was made was framed in terms of what McWethy's testimony would be rather than what the defendant's testimony would be. The State further argues that even if evidence of the alleged conversations was improperly excluded, such error is not reversible or prejudicial when substantially the same evidence is received at some other stage of the trial. *People* v. *Saltz* (1979), 75 Ill. App. 3d 477; *People* v. *Limas* (1977), 45 Ill. App. 3d 643.

We do not agree that the defendant has waived consideration of this issue due to his failure to make offers of proof in each instance of an excluded conversation, or by virtue of the irregular form of the offer of proof he did make. The exclusion of an alleged hearsay conversation which is integral to the defendant's theory of defense has been held to deny the defendant a fair trial. (See *People* v.

Canamore (1980), 88 Ill. App. 3d 639.) As such, the error asserted woud be cognizable as plain error. (Ill. Rev. Stat. 1979, ch. 110A, par. 615(a).) Further, an offer of proof is not required when the evidence sought to be admitted is obviously material and relevant. (*People* v. *Christen* (1980), 82 Ill. App. 3d 192.) No doubt the trial court was aware of what the defendant was trying to establish by the excluded conversations, and its exclusion of McWethy's out-of-court statements on and after October 31 was error because such statements were not hearsay. They were not offered to prove that the narcotics business is a lucrative one, but to show the effect McWethy's statements had on the defendant's actions. Further, defendant's post-trial motions specifically charged error in the court's exclusion of the October 31 conversation between McWethy and the defendant. Consequently, we believe the error has been adequately preserved for review.

Despite the court's erroneous exclusion of this evidence, however, we agree with the State that the error does not mandate reversal under the facts of this case. First, as suggested by the State, the evidence excluded which would have had a bearing on the defendant's entrapment defense was more than substantially presented to the jury during the course of the trial. (*People* v. *Limas* (1977), 45 Ill. App. 3d 643; *People* v. *Moretti* (1955), 6 Ill. 2d 494, 529.) The defendant testified extensively to the entreaties made to him by Burns which contained the same inducements as those apparently made by McWethy as set forth in the one offer of proof the defendant did make as to McWethy's testimony. These alleged inducements were primarily more money, a nicer car, and improved living quarters. Further, the jury heard the defendant testify McWethy supplied him with the cocaine to sell to Burns. Although McWethy did not testify at trial in order to rebut the defendant's testimony that the State through its agent,

McWethy, supplied the illegal substance, there was contrary testimony received from Agent Burns during the State's case-in-chief that Rocky was the defendant's source. (*Cf. People* v. *Lenair* (1979), 77 Ill. App. 3d 870, 872 (testimony during case-in-chief of special agent which effectively denied she supplied defendant with drugs held sufficient to resist defendant's claim on appeal with drugs held sufficient to resist defendant's claim on appeal there was a "take back" entrapment as a matter of law because the special agent was not recalled on rebuttal).) Several prior cases had held that the failure of the informer to testify in order to rebut the evidence that he supplied the drugs was reversible error, but the rule now is that the fact the government supplied the drugs is only one of the factors to be considered when the entrapment defense is raised. (*People* v. *Cross* (1979), 77 Ill. 2d 396, overruling in part *People* v. *Dollen* (1972), 53 Ill. 2d 280 and *People* v. *Strong* (1961), 21 Ill. 2d 320.) Additionally, it was quite clear that McWethy was not available to testify because his whereabouts were unknown and an arrest warrant had been issued about six months prior to the trial. Since McWethy's absence was explained, no inference against the State may be said to have arisen for its failure to present McWethy as a witness. (See, *People* v. *Cross*, cited above.) Finally, during the defendant's testimony regarding his December 2 phone call to his sister, the jury heard of the alleged threats made to the defendant that he would be maimed, have his limbs broken, and "not see 1979." In view of the substantial testimony the jury received despite the excluded conversations, we determine that evidence of the defendant's conversations with McWethy would have been cumulative at best.

Additionally, we believe the error is not reversible because the evidence shows the defendant was predisposed to commit the offense and, consequently, the defense of

entrapment was not available to him. (*People* v. *Tipton* (1980), 78 Ill. 2d 477.) In a recent case, the defendant was found to be predisposed to commit the offense where he seemed familiar with drugs and their quality, the drug trade in the area, where he offered the agent price breaks, and where the defendant's wife testified he had in the past used LSD and marijuana. (*People* v. *Cross* (1979), 77 Ill. 2d 396.) In *People* v. *Tipton*, the defendant was found to be predisposed where he admitted he originated the idea of contacting the supplier and called the supplier several times, he had taken acid and had gotten his brother high, he had arranged two other sales subsequent to the offense charged, was familiar with drugs, and was willing to accommodate those desirous of obtaining drugs.

Our review of the record in the case at bar shows there was sufficient evidence from which the jury could have determined the defendant was predisposed to commit the offense. There was no evidence that McWethy was acting as an agent of the State at the time he met the defendant in early October. At that time the defendant gave him his home address, and McWethy visited him in mid-October for several hours. The substance of their conversation at that time was objected to by the State and the objection was correctly sustained by the court. McWethy's October 25 arrest, recognizance release on October 30, and introduction of Burns to the defendant on October 31 would certainly seem to indicate that McWethy had been impressed into service by the State as an informer. On the occasion of the first transaction, October 31, the informer allegedly supplied the defendant with a quarter-ounce of cocaine for which the informer wanted $475. However, the defendant—presumably an unwilling, entrapped victim—agreed after a total of approximately 30 minutes of coaxing that day to sell the cocaine at a profit to Burns for $550. The record does not indicate how this price was

arrived at, save for a comment imputed to McWethy that the defendant could make "$75.00 that day real easy." The profit was purportedly to compensate the defendant for the use of his house.

The defendant's willingness to profit from such an illegal sale must certainly be considered a factor in determining whether he was predisposed to commit the illegal act. We also consider as evidence of predisposition his one-to-three times a month use of marijuana, and the fact that he expressed no reluctance whatsoever in participating in the cocaine testing ritual. Further, on the occasion of the second transaction on November 15, the defendant—at the merest suggestion from McWethy—extracted from the quarter-ounce of cocaine a small amount for his own use, replacing the lost weight with baking soda. He then felt "sheepish" about it when Burns complained about the quality of the cocaine and not only discounted the price to $530—thereby reducing his profit to $55—but also threw in the small portion he had extracted. Despite his alleged "sheepishness" about the foregoing incident, on December 3 he precisely followed McWethy's instructions and mixed one full ounce of baking soda with the one ounce of cocaine he had allegedly received from McWethy and sold it to Burns as two ounces of cocaine for $3400, despite the fact McWethy demanded only $1800. In each of these transactions, McWethy demanded less than the amount for which the defendant actually sold the cocaine, and the defendant testified Burns never threatened him.

The defendant's theory at trial that McWethy and Burns entrapped him into selling drugs by glorifying the financial advantages incidental thereto does not establish that entrapment of the unwary innocent occurred. It tends to demonstrate, however, that the selected "medium" was suitable for cultivation; that is, the defendant was pre-

disposed to cooperate, and needed only the opportunity to do so. We conclude the defendant was self-motivated to profit by selling the cocaine, and McWethy and Burns merely provided him with an opportunity to achieve that profit, even assuming, arguendo, that McWethy supplied the cocaine. In appellate review of the entrapment defense, the court is to determine all testimony of the defendant in the light most favorable to him. (*People* v. *Carpentier* (1974), 20 Ill. App. 3d 1024.) Even affording the defendant's testimony this favorable consideration, we find the jury was correct in its finding that the defendant had not been entrapped but, rather, he was predisposed to commit the offense. As such, we do not feel the defendant may complain that his entrapment defense was prejudiced by the court's error with regard to the hearsay conversations, since the defense of entrapment is not available to a defendant who is predisposed to commit the offense.

The State next argues the defendant has waived consideration of prejudicial reversible error arising as the result of the prosecutor's closing argument because the defendant failed to object during trial. (*People* v. *King* (1977), 66 Ill. 2d 551, 559.) The State points out that error in closing argument amounts to plain error only when a statement is so prejudicial that it deprives the defendant of a fair trial and has been a material factor in the guilty verdict of the jury. *People* v. *Ford* (1980), 83 Ill. App. 3d 57, 69.) Of course, as defendant notes, it is true that counsel may not do or say anthing in closing argument which is for the sole purpose of inflaming or prejudicing the jury against the defendant. (*People* v. *Dukes* (1957), 12 Ill. 2d 334.) However, defendant's charge that the prosecutor improperly referred to the defendant as a "big-time drug dealer" during closing

argument is simply not supported by the record. The prosecutor's references to a "big-time drug dealer" were all references to McWethy, not the defendant. Defense counsel, on the other hand, did use the term in question in reference to the defendant when he argued to the jury that the State was trying to make the defendant look like a "big-time drug dealer." Consequently, defendant's charge of error in this respect is completely specious.

The reference by the prosecutor to the entrapment defense as a "last resort defense" during closing argument is next pointed out by the defendant, but defendant does not argue what prejudicial effect, if any, this statement may have had on the jury. Defendant simply cites authority for the proposition that the entrapment defense is a completely lawful one. (*People* v. *Cross, Haywood and Thomas, etc.* (1978), 63 Ill. App. 3d 628.) The prosecutor's description of the defense as a "last resort" one, does not negative its validity; considering that a defendant relying on the entrapment offense must first admit having committed the offense, the defense does appear to be the defendant's final hope. The State's analogy of the instant phrase to the insanity defense as a "last ditch" defense in *People* v. *Smith* (1976), 41 Ill. App. 3d 776 is well taken. The court in *Smith* found that phrase did not amount to plain error. We believe a similar result is warranted here, and defendant's failure to object at trial constitutes a waiver.

Defendant likewise has waived consideration of two other statements made by the prosecutor during closing argument. The defendant charges it was error for the prosecutor to argue that no one except the defendant had seen McWethy since October 31 since the State stipulated that the circuit court clerk's file on McWethy was true and correct. The defendant mischaracterizes the file

as showing McWethy having made four court "appearances" in connection with his arrest for unlawful possession of cannabis and theft. The circuit clerk testified, however, there were four "continuances" of McWethy's case not "appearances" of McWethy. There is nothing in the record to suggest that McWethy was actually present when the continuances were granted.

The last of the prosecutor's comments complained of is that the defendant "had sold all kinds of drugs." Detective Donahoe testified the defendant had told him "* * * He had used every drug. He had used and sold them all and he knew about them." The prosecutor's statement was not only a proper inference from the evidence, it was very nearly a verbatim quote of what the jury had already heard during rebuttal testimony. The record simply does not support the defendant's contentions of error with regard to the prosecutor's closing argument. Further, his failure to interpose timely objections thereto have waived the issue on appeal.

The defendant's last contention on appeal is that Detective Donahoe's testimony was improper because it did not rebut the character evidence submitted by the defendant. Defendant appears to ignore, however, that once he has presented some evidence of the affirmative defense of entrapment, the burden shifts to the State to rebut that evidence, and the State bears the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense. *People* v. *Tipton* (1980), 78 Ill. 2d 477; Ill. Rev. Stat. 1979, ch. 38, par. 3-2(b).

As noted by the State, rebuttal evidence is that which is produced to explain, repel, contradict, or disprove evidence given by the defendant. (*People* v. *Nettles* (1969),

107 Ill. App. 2d 143.) Detective Donahoe's testimony was classically rebuttal in nature. The defendant at one point testified he never used any drugs whatsoever, but testified later he did smoke marijuana occasionally. He also testified he never used cocaine except during the incidents with Burns. The pre-plea report was offered to rebut that particular part of his testimony since the report preparer testified the defendant himself stated he used cocaine once or twice a week up until January of 1979. On cross-examination, the defendant testified he had not used cocaine before October 31, 1978, nor in the year 1979. The evidence showed defendant was only in Burns' presence on three occasions, however; October 31, November 15 and December 3. Detective Donahoe's testimony likewise rebutted the defendant's testimony since the defendant stated to him in June or July of 1977 that he had "used and sold all drugs" which includes both cocaine and marijuana. The purpose of the rebuttal testimony offered by the State through Detective Donahoe's testimony was not meant to rebut the evidence given by the defendant's character witnesses; it was meant to rebut the defendant's entrapment defense by showing his predisposition to commit the offense charged. Furthermore, the record shows the defendant was fully aware that the purpose of Donahoe's testimony was to impeach the defendant's credibility because the court heard arguments in chambers during trial about its intended use and it was determined at that time that it was proper rebuttal testimony.

For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

JUDGMENT AFFIRMED.

HOPF and VAN DEUSEN, JJ., concur.

55431

ILLINOIS SUPREME COURT

CLELL L. WOODS, CLERK

Supreme Court Building

Springfield, IL 62706

(217) 782-2035

November 30, 1981

Mr. Sidney Z. Karasik
Attorney at Law
134 S. LaSalle St.
Chicago, IL 60603

No. 55431 — People State of Illinois, respondent, vs. Jack Husted, petitioner. Leave to appeal, Appellate Court, Second District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause. Mr. Justice Moran took no part.

Very truly yours,

/s/ Clell L. Woods

Clerk of the Supreme Court

OFFICE OF
CLERK OF THE SUPREME COURT
State of Illinois
Springfield
62706

December 14, 1981

Mr. Richard Husted
Attorney at Law
35 Fountain Square Plaza
Elgin, IL 60120

In re: People State of Illinois, respondent,
vs. Jack Husted, petitioner.
No. 55431

Dear Mr. Husted:

This office has today received and filed your notice, motion, affidavit and order entered by Justice Daniel P. Ward staying the mandate of this Court until disposition of a petition for writ of certiorari to be filed in the Supreme Court of the United States in the above entitled cause.

Very truly yours,

.....
Clerk of the Supreme Court

CLW:gn

CC — Hon. Tyrone C. Fahner
Hon. Robert Morrow
State's Atty., Kane County
Atty. Sidney Z. Karasik
134 S. LaSalle St.
Chicago, IL